

DECLASSIFIED BY UC 60322 LP/STP/SZ  
ON 12-17-2010

FBI

LJK

Date:	4/14/2008	Location:	Capital Hill	Committee	SAC
Time:	3:30 pm	Room:	Defense SCIF 116	Sub-Comm	CJS
SUBJECT/TOPIC		Unclassified Going Dark Brief			
Attendees:		Office		Title	
1	Richard Haley	FBIHQ – Finance Division		Assistant Director	
2	Kerry Hayens - MB	FBIHQ – Science and Tech Branch		Executive Assistant Director	
3		FBIHQ – Finance Division		Approp Liaison Officer	
4		FBIHQ- OCA		Congressional Affairs Spec	
5		Senator Mikulski's Office		Professional Staffer – CJS	
6		Senator Mikulski's Office		Committee Clerk – CJS	

Handouts – An unclassified power point handout entitled “Going Dark” was provided for the brief.

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- The main message presented by EAD Haynes is that the ability of the FBI to collect intelligence and conduct investigations through the use of technology is shrinking ever day.

- Advances of technology include:

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- The FBI considers that it is currently, in what it refers to as, the possibly of collection/intercept based on the technology of today.

- The presentation further detailed specific technological advances and speculation on where the technology industry is headed and what must be done for the FBI to continue to play a proactive role to combat criminal and terrorism investigations.

**QUESTIONS/CONCERNS FROM [REDACTED] AND [REDACTED]**

- [REDACTED] asked what the FBI's 5 year plan was and referenced the DNI 5 year plan which he has not had access to.
- [REDACTED] asked how big of a priority this was to the FBI and to law enforcement nationwide.
- [REDACTED] asked if this would be done by contract workers or FBI staff.
- [REDACTED] asked if we were collecting less intelligence information via FISA, etc due to emerging technologies.
- [REDACTED] asked if the FBI was optimistic that it would be able to capture this data in the future with the right resources.
- Is the exploitation of ELSUR currently being addressed by the cyber security initiative

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EFF/Cardozo-67

~~Confidential~~


8/17/2009



How does the FBI propose to solve this problem?

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Response:

- The FBI has developed a national Electronic Surveillance Strategy to preserve vitally important law enforcement and IC electronic surveillance capabilities. The Strategy is composed of five unique, yet complimentary, components:
  - A rectangular black box used to redact information from the list.
  - Enhancing law enforcement and IC electronic surveillance coordination;
  - Enhancing electronic surveillance cooperation between industry, law enforcement and IC agencies; and
  - Increasing law enforcement and IC electronic surveillance technical and financial resources.

Why should the FBI's strategy be pursued on behalf of law enforcement and the IC?

Response:

- The FBI is well suited to gain consensus regarding all aspects of advanced methods of electronic surveillance and to ensure comprehensive understanding of the technical and/or operational challenges faced by law enforcement and IC agencies and help devise and implement solutions. The FBI has an established, robust liaison with all aspects of the communications industry and has routinely been required to work with the industry to develop intercept capabilities for the law enforcement community that are leveraged for intelligence cases as well as capabilities utilized solely by the IC. As a result, the communications industry is comfortable working with the FBI under domestic authority to develop tools that are narrowly tailored to comply with these authorities. In addition, although typically ad hoc and tactical in nature, the FBI has long assisted other Federal, state, and local law enforcement effect criminal and Cyber-based electronic surveillance. And, as a key IC member, the FBI provides vital daily support to IC agencies by effecting national security intelligence, counter-intelligence, and counterterrorism intercepts.

Information provided/approved by: AD Marcus Thomas  
Date: 01/14/2009

EFF/Cardozo-68



## GOING DARK

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What is "Going Dark"?

Response:

- "Going Dark" refers to law enforcement's limited capability to comprehensively and lawfully collect data and information, conduct electronic surveillance and analyze the raw data due to the rapid evolution of telecommunications and data collection technology and services.

- [REDACTED]

- [REDACTED]

Didn't Congress already solve this problem when it passed the Communications Assistance for Law Enforcement Act (CALEA) in 1994?

Response:

- No, CALEA applied to telecommunications carriers and to services that replace a substantial portion of the local exchange service.
- CALEA excludes a wide range of other services which travel over wire and electronic communications transmission networks and are interwoven in network traffic.

What are some of the specific problems the FBI and the rest of the law enforcement are facing?

Response:

- [REDACTED]

**How does the FBI propose to solve this problem?**

**Response:**

- To meet this challenge, key law enforcement and industry representatives have collaborated with the FBI to form a comprehensive, five-pronged National Lawful Intercept Strategy. Key points include:
  - modernizing lawful intercept laws;
  - updating lawful intercept authorities;
  - increasing law enforcement coordination;
  - establishing broader industry liaison, and
  - seeking increased funding for these efforts.

Information provided/approved by: AD Marcus Thomas, OTD  
Date: 5/29/2009

EFF/Cardozo-70

[REDACTED] (RMD) (FBI)

From: BEERS, ELIZABETH RAE (OCA) (FBI)  
 Sent: Monday, January 28, 2008 2:48 PM  
 To: [REDACTED] (DO) (FBI); [REDACTED] (OCA) (FBI)  
 Cc: [REDACTED] (HO) (FBI)  
 Subject: FW: IMMEDIATE: Q&A for Director's briefing book - "Going Dark"

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Attachments: Going Dark QAs.doc

UNCLASSIFIED  
NON-RECORD

for the briefing book.

Beth Beers  
 Office of Congressional Affairs  
 [REDACTED]

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From: THOMAS, MARCUS C. (OTD) (FBI)  
 Sent: Monday, January 28, 2008 2:30 PM  
 To: HAYNES, KERRY E. (DO) (FBI); BEERS, ELIZABETH RAE (OCA) (FBI)  
 Cc: COOK, PATRICK B. (OTD) (FBI); DICLEMENTE, ANTHONY P. (OTD) (FBI); SMITH, CHARLES BARRY (OTD) (FBI)  
 Subject: RE: IMMEDIATE: Q&A for Director's briefing book - "Going Dark"

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Kerry, Beth,

See attached proposed Q&A for the "Going Dark" question. We can, of course, provide much more detail when/if needed, however, I wanted to keep it short and simple.

Marcus



Going Dark  
 QAs.doc (51 KB)

From: HAYNES, KERRY E. (DO) (FBI)  
 Sent: Monday, January 28, 2008 8:22 AM  
 To: THOMAS, MARCUS C. (OTD) (FBI)  
 Subject: IMMEDIATE: Q&A for Director's briefing book - "Going Dark"

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Kerry E. Haynes  
 Executive Assistant Director  
 Science and Technology Branch  
 FBIHQ Room 7125  
 [REDACTED]

EFF/Cardozo-71

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From: BEERS, ELIZABETH RAE (OCA) (FBI)  
 Sent: Friday, January 25, 2008 6:37 PM  
 To: HAYNES, KERRY E. (DO) (FBI)  
 Subject: FW: Q&A for Director's briefing book - "Going Dark"

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Kerry - checking on the status of this request - we're trying to finalize our briefing material so that we can have it waiting for the Director in Honolulu. Appreciate the help. Thanks,

Beth Beers  
 Office of Congressional Affairs  
 [REDACTED]

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From: BEERS, ELIZABETH RAE (OCA) (FBI)  
 Sent: Tuesday, January 15, 2008 5:51 PM  
 To: HAYNES, KERRY E. (DO) (FBI)  
 Cc: [REDACTED] (DO) (FBI); [REDACTED] (OCA) (FBI)  
 Subject: Q&A for Director's briefing book - "Going Dark"

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Kerry - the Director will be testifying before SSCI (2/5) and HPSCI (2/7) with the other IC principals at the annual threat assessment hearing. We're preparing his briefing book and have been asked to include a Q&A on "Going Dark." [REDACTED] advises that you've got something prepared that addresses the implications on lack of funds to our technical operations. We're looking for something relatively short that the Director could use to respond if he gets a question. There will be both open and closed sessions, so if the answer requires disclosure of classified information, please portion-mark the answer. Apologize for the short deadline - if we could get something by 1/22 that would be great. Please call if you have questions. Thanks,

Beth Beers  
 Office of Congressional Affairs  
 [REDACTED]

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EFF/Cardozo-72

[REDACTED] (RMD) (FBI)

From: [REDACTED] (OTD) (FBI)  
 Sent: Friday, May 29, 2009 1:00 PM  
 To: [REDACTED] (DO) (FBI)  
 Cc: DICLEMENTE, ANTHONY P. (OTD) (FBI); COOK, PATRICK B. (OTD) (FBI); [REDACTED]  
 [REDACTED] (OTD) (FBI); [REDACTED] (OTD) (FBI)  
 Subject: FW: Going Dark request - Deadline today at 2:30  
 Attachments: OTD-GoingDarkDoc 1\_14\_09 (4).doc

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[REDACTED]  
 Here is the Going Dark response. [REDACTED]  
 [REDACTED]

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See attached for revised version:



OTD-GoingDarkDo  
 c 1\_14\_09 (4).d...

From: [REDACTED] (OTD) (FBI)  
 Sent: Friday, May 29, 2009 10:01 AM  
 To: [REDACTED] (OTD) (FBI)  
 Cc: [REDACTED] (OTD) (FBI); COOK, PATRICK B. (OTD) (FBI)  
 Subject: FW: Going Dark request - Deadline today at 2:30  
 Importance: High

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[REDACTED] as discussed here is the items needed to be reviewed. DEADLINE IS 2:30 TODAY.

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[REDACTED]  
 Executive Assistant  
 Operational Technology Division

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[REDACTED] Blackberry  
 [REDACTED]@ic.fbi.gov

From: [REDACTED] (DO) (FBI)  
 Sent: Friday, May 29, 2009 9:54 AM  
 To: THOMAS, MARCUS C. (OTD) (FBI)  
 Cc: [REDACTED] (OTD) (FBI); [REDACTED] (OTD) (FBI)  
 Subject: Going Dark request - Deadline today at 2:30  
 Importance: High

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Mr. Marcus,

I work in OCA and am preparing the Director's briefing material for his upcoming appearance before the Senate Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies on June 4, 2009. It has come to OCA's attention that questions will be posed on the topic of Going Dark in both the closed and open hearing sessions.

AD Powers advised he recently met with you on Going Dark and requested that I send this directly to you for review. Therefore, attached paper is a Question and Answer format that I believe covers the potential areas on this topic. Could you please review the paper and edit for changes? Also, the Director prefers concise and brief answers to the questions. The answer to the last question on page 2 is rather lengthy. Could this be condensed to a shorter answer? In addition, please feel free to add any other additional questions you deem necessary.

<< File: OTD-GoingDarkDoc 1\_14\_09 (3).doc >>

I apologize for requesting a short deadline, but I will need this paper returned by 2:30 today.

Thank you for your assistance on this matter,

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UC [REDACTED]  
Special Projects Unit  
Office of Congressional Affairs  
[REDACTED]

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EFF/Cardozo-74



FY 2010 Legislative Call  
Office of the General Counsel

**PROPOSAL**

In an effort to remedy interception and ELSUR-related gaps, and provide LEAs with the tools they need to accomplish their mission, the FBI has developed a national strategy known as the "Going Dark Initiative." The Going Dark Initiative includes several significant elements, one of which is the attached catalog of ELSUR and ELSUR-related legislative proposals designed to update and improve existing Federal ELSUR laws and assistance mandates and to enact new ELSUR and ELSUR-related laws to support LEAs' investigative efforts. As the events of September 11, 2001 show, law enforcement cannot *connect* the intelligence and evidentiary dots unless it first *collects* those dots. Absent needed legislation, LEAs increasingly will encounter outages, which will ultimately result in LEAs going dark with regard to the collection of essential evidence and intelligence information.

**JUSTIFICATION**

Lawfully-authorized electronic surveillance (ELSUR) is critical to enforcing the law, protecting our citizens, and maintaining our nation's security. Preserving and enhancing the capabilities used to intercept specific communications content and communication-identifying information is essential to this effort. In recent years, the variety and complexity of communications services and technologies introduced to the marketplace have increased dramatically.

[REDACTED] As a result, United States law enforcement is faced with an ever-increasing gap in ELSUR capabilities. Gaps in ELSUR capabilities, however, are not in and of themselves the only difficulties confronting law enforcement. As technology and communications services advance, LEAs also face greater challenges in carrying out the fundamental aspects of their investigative mission.

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**COST IMPACT**

Unknown

**POINT OF CONTACT**

[REDACTED] Science and Technology Law Unit, [REDACTED]

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**ADMINISTRATIVE NOTE**

Proposal was prepared, approved, and submitted by OGC

EFF/Cardozo-75

**MISCELLANEOUS LEGISLATIVE PROPOSALS  
NOT INCLUDED IN THE SCIENCE AND  
TECHNOLOGY LAW OFFICE'S RESPONSE TO  
THE 111<sup>TH</sup> CONGRESS LEGISLATIVE CALL**

**NOVEMBER 14, 2008**

EFF/Cardozo-76

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OPCA-20 (12-3-96)

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**EFF/Cardozo 78-86:** FY 2010 Legislative Call "Point Paper." Pages are miscellaneous legislative proposals under internal discussion relating to enhancing ELSUR capabilities. Point Paper is an internal discussion on proposals pertaining to a subject: i.e. Going Dark Initiative.

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### Modernizing Federal Electronic Surveillance Laws

Court-authorized electronic surveillance (ELSUR) is critical to enforcing the law, protecting our citizens, and maintaining our Nation's security. Maintaining a capability to intercept specific communications content and communications identifying information is vital. But maintaining ELSUR capabilities is not an end in itself; it is the ELSUR "collection product" that is critical to all types of national security and criminal investigations. Post-9/11, sharing the collection product is essential, underscoring the basic proposition that agencies cannot *connect* the intelligence and evidentiary dots unless they first *collect* those dots.

In recent years, the variety and complexity of communications technologies have increased dramatically,<sup>1</sup> and [REDACTED]

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[REDACTED] - giving rise to an ELSUR "interception capability gap."

Absent needed legislation and a substantial increase in resources, LEAs, including the FBI, increasingly will encounter ELSUR outages on the road to "*going dark*."

The FBI in concert with LEA representatives has devised a five-pronged National ELSUR Strategy composed of:

- (1) modernizing the Federal ELSUR assistance mandates<sup>2</sup> and Federal ELSUR laws<sup>3</sup>
- (2) enacting new ELSUR-enhancing statutory authorities
- (3) enhancing LEA ELSUR coordination
- (4) enhancing ELSUR cooperation between industry and LEAs
- (5) increasing technical and financial resources for LEAs

Highlights of the legislative proposals under prongs 1 and 2 are outlined in brief in the table below. The specific legislative provisions proposed and the rationale for them are set forth in Attachments 1 and 2.

(1) Modernizing Fed ELSUR Assistance / ELSUR Laws	(2) New ELSUR-enhancing Statutory Authorities
[REDACTED]	

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[REDACTED]

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<sup>2</sup> The primary Federal ELSUR assistance mandate is the Communications Assistance for Law Enforcement Act of 1994, Pub. L. 103-414 (CALEA). However, long before CALEA, Congress mandated "technical assistance" in all of our Nation's ELSUR laws (see 18 U.S.C. §2518(4)(Title III), 18 U.S.C. §3124 (criminal law pen registers/trap-traces), 50 U.S.C. §1805(c)(2)(FISA), and 50 U.S.C. §1842(d)(B)(FISA pen registers/trap-traces).

<sup>3</sup> Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351 ("Title III"); the Foreign Intelligence Surveillance Act of 1978, Pub. L. 95- 511 ("FISA"); and the Electronic Communications Privacy Act of 1986, Pub. L. 99-508 ("ECPA").

## **Attachment 1: Modernizing the Federal ELSUR Assistance Mandates and Federal ELSUR Laws**

EFF/Cardozo-88

OPCA-20 (12-3-96)

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**EFF/Cardozo 89-102:** FY 2010 Legislative Call "Point Paper", section Modernizing the Federal ELSUR Assistance Mandates and Federal ELSUR Laws. Pages are legislative proposals under internal discussion relating to amending CALEA, Title III, ECPA, Pen Register/Trap provisions and FISA laws.

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## **Attachment 2: Enacting New ELSUR-enhancing Statutory Authorities**

EFF/Cardozo-103



OPCA-20 (12-3-96)

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**Section 552****Section 552a**

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**EFF/Cardozo 104-105:** FY 2010 Legislative Call "Point Paper", section Enacting New ELSUR-enhancing Statutory Authorities. Pages are legislative proposals under internal discussion relating to amending current laws or proposing new laws that would enhance ELSUR capabilities.

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**FBI LEGISLATIVE AND POLICY PROPOSALS**

1. Going Dark

Proposal: Update and improve certain existing ELSUR laws to allow for catch up to changing technology.

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2. Data Retention

Proposal: Require Electronic Communication Service Providers to retain for two years records showing the origination and termination of communications.

3. Extension of certain Human Resource authorities

Proposal: Amend 2005 Consolidated Appropriation Act to eliminate expiration date of December 31, 2009, on authority to grant retention and relocation bonuses.

4. Mass Killings

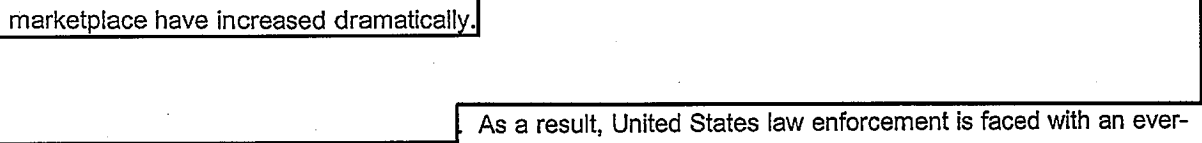
Proposal: Amend Title 28 to give the FBI statutory authority to assist in investigation of mass killings or attempted mass killings in schools, colleges, universities, non-federal office buildings, malls, and other public places.

5. Infrastructure/Facilities

Proposal: Eliminate requirement for GSA review and approval of long-terms leases. Institute DOJ review and approval procedures.

### The Going Dark Initiative

Lawfully-authorized electronic surveillance (ELSUR) is critical to enforcing the law, protecting our citizens, and maintaining our nation's security. Preserving and enhancing the capabilities used to intercept specific communications content and communication-identifying information is essential to this effort. In recent years, the variety and complexity of communications services and technologies introduced to the marketplace have increased dramatically.



As a result, United States law enforcement is faced with an ever-increasing gap in ELSUR capabilities. Gaps in ELSUR capabilities, however, are not in and of themselves the only difficulties confronting law enforcement. As technology and communications services advance, LEAs also face greater challenges in carrying out the fundamental aspects of their investigative mission.

In an effort to remedy interception and ELSUR-related gaps, and provide LEAs with the tools they need to accomplish their mission, the FBI has developed a national strategy known as the "Going Dark Initiative." The Going Dark Initiative includes several significant elements, one of which is the attached catalog of ELSUR and ELSUR-related legislative proposals designed to update and improve existing Federal ELSUR laws and assistance mandates and to enact new ELSUR and ELSUR-related laws to support LEAs' investigative efforts. As the events of September 11, 2001 show, law enforcement cannot *connect* the intelligence and evidentiary dots unless it first *collects* those dots. Absent needed legislation, LEAs increasingly will encounter outages, which will ultimately result in LEAs going dark with regard to the collection of essential evidence and intelligence information.

The specific legislative proposals and the rationale for each are set forth in Attachments 1 and 2 below.

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## **Attachment 1: Updating and Improving Federal ELSUR Laws and Assistance Mandates**

EFF/Cardozo-108

OPCA-20 (12-3-96)

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**EFF/Cardozo 109-122:** FY 2010 Legislative Call "Point Paper", section Updating and Improving Federal ELSUR Laws and Assistance Mandates. Pages are legislative proposals under internal discussion relating to amending CALEA, Title III, ECPA, Pen Register/Trap provisions and FISA laws (essentially the same as Bates pages 89-102).

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## **Attachment 2: Enacting New ELSUR and ELSUR- Related Laws and Capabilities**

EFF/Cardozo-123

OPCA-20 (12-3-96)

**FEDERAL BUREAU OF INVESTIGATION  
FOIA/PA DELETED PAGE INFORMATION SHEET**

  2   Page(s) withheld entirely at this location in the file. One or more of the following statements, where indicated, explain this deletion.

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**Section 552****Section 552a**☐ (b)(1)☐ (b)(7)(A)☐ (d)(5)☒ (b)(2)☐ (b)(7)(B)☐ (j)(2)☐ (b)(3) \_\_\_\_\_☐ (b)(7)(C)☐ (k)(1)☐ (b)(7)(D)☐ (k)(2)☒ (b)(7)(E)☐ (k)(3)☐ (b)(7)(F)☐ (k)(4)☐ (b)(4)☐ (b)(8)☐ (k)(5)☒ (b)(5)☐ (b)(9)☐ (k)(6)☐ (b)(6)☐ (k)(7)

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**EFF/Cardozo 124-125:** FY 2010 Legislative Call "Point Paper", section Enacting New ELSUR and ELSUR-Related Laws and Capabilities. Pages are legislative proposals under internal discussion relating to amending current laws or proposing new laws that would enhance ELSUR capabilities (essentially the same as Bates pages 104-105).

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